NO. 82041-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ROBINETTE AMAKER,

Appellant,

vs.

KING COUNTY, a municipal corporation; STANLEY MEDICAL RESEARCH INSTITUTE; and E. FULLER TORREY,

Respondents.

Plaintiff

BRIEF OF APPELLANT AMAKER

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I. INTRODUCTION

Appellant Robinette Amaker seeks damages resulting from the wrongful harvest and shipment of body parts from her deceased brother, Bradley Gierlich. Amaker alleges that King County and the Stanley Medical Research Institute (SMRI) acted wrongfully in removing and receiving Bradley Gierlich's body parts without first obtaining statutorily required consent.

Amaker filed this claim in Pierce County Superior Court, but the defense removed it to Federal Court. The District Court for the Western District of Washington dismissed the case and Amaker appealed to the United States Court of Appeals for the Ninth Circuit. The parties have fully briefed and argued the case before the Ninth Circuit. Pursuant to Amaker's motion, the Ninth Circuit has certified the following questions to this court:

> (1) Whether only those individuals identified as "next of kin" as defined by RCW § 68.50.160 at the time of the decedent's death have standing to bring a claim for tortious interference with a corpse?
>
> (2) If the answer to the above question is "no," whether Amaker, the decedent's sister, is within the class of plaintiffs that may bring a claim for tortious interference with a corpse?
>
> (3) Whether the Washington Anatomical Gift Act, RCW § 68.50.520 *et seq.*, creates an implied

private right of action upon which Amaker may state a claim?

The Ninth Circuit emphasized that it did not wish its framing of the questions certified to restrict this court's consideration of the issues. Appendix 1, p. 11720. This court has accepted the Ninth Circuit's certification.

This court's decision in *Adams v. King County,* Docket No. 81028 (September 25, 2008), has answered certified question three in the negative. This brief will therefore focus upon certified questions numbers one and two.

II. ISSUES PERTAINING TO CERTIFIED QUESTIONS

1. Whether Robinette Amaker, as a "relative" of the deceased, Bradley Gierlich, had standing to sue for tortious interference with his remains?

2. If standing to sue for tortious interference with a corpse only vests in those with the statutory right to disposition of the remains of the deceased, did Amaker have standing by virtue of the fact that, pursuant to RCW 68.50.550(1)(f) and (2)(a), she had the statutory right to make an anatomical gift of "all or part" of Bradley Gierlich's remains?

3. If only one with the statutory right to disposition of the

remains under RCW 68.50.160 has standing to sue for tortious interference, did Amaker have standing where the "next of kin" under RCW 68.50.160 at the time of Bradley Gierlich's death never learned of the defendants' misconduct in his lifetime, and, at the time of learning of the defendants' misconduct, Amaker was the "next of kin" under RCW 68.50.160?

III. STATEMENT OF THE CASE

1. Facts

A. Introduction

Bradley Gierlich died in Seattle on October 13, 1998. His father, Robert Gierlich, and sister, Robinette Amaker, were his only direct family members to survive him. They lived in Florida. Bradley Gierlich's maternal aunt, Theresa Wright, lived in Seattle. Excerpts of Record (ER) 118-119, 132-133, 242, 250.[1] When Bradley died, the King County Medical Examiner (KCME) took his body to its facilities where pathologist Sigmund Menchel performed an autopsy. ER 55, 118-121, 223-228.

[1] The references to the record will follow the format used in the United States Court of Appeals for the Ninth Circuit.

B. SMRI/KCME Contract

Four years earlier, in the spring of 1994, KCME and SMRI entered into a contract. ER 94, 113-117. SMRI wished to fund a pathologist to work at KCME to collect post-mortem brain tissue for SMRI's research purposes. ER 111.

Under the contract, SMRI agreed to pay for the pathologist's salary and benefits. This pathologist would work 75 percent for KCME and 25 percent for SMRI. ER 112. The pathologist would identify potential donors, contact family members for consent, remove and process body parts from the deceased, and ship those body parts to SMRI. ER 113.

The contract itself only described harvesting "brain tissue." ER 111, 112, 113. However, both SMRI and KCME understood that, in processing of the parts harvested from the deceased, they would take more. The SMRI pathologist would take liver and spleen parts, blood, cerebral spinal fluid and glands as well. ER 79, 99, 229.

With respect to SMRI duties, both KCME Chief Medical Examiner Donald Reay and SMRI chairperson E. Fuller Torrey, MD, would supervise the SMRI pathologist. ER 113. Sigmund Menchel, MD, acted as the SMRI-funded pathologist at KCME at the time

Bradley Gierlich died. ER 98-99.

Both SMRI and KCME fully understood and acknowledged the need to obtain consent for any organ donation for SMRI. The contract specifically placed this duty on the SMRI-funded pathologist, requiring him to (ER 113, emphasis added):

> Contact the appropriate family members of the official brain donor to request and obtain permission to remove and utilize the candidate's brain for research purposes. **It is mutually agreed that no brain tissue shall be collected for the Stanley Foundation without prior written permission of the donor's legal next-of-kin.**

C. Harvesting and Shipment of Bradley Gierlich's Body Parts to SMRI

Menchel performed the autopsy on Bradley Gierlich on October 16, 1998. ER 223-228. He decided that Bradley's remains would be suitable for donation to SMRI. He claims that he tried to contact Robert Gierlich a number of times by telephone. ER 101. The defense has produced nothing documenting those supposed attempts at contact.

Menchel also says that he spoke to Theresa Wright about the donation. He asserts that Wright assured him that Robert Gierlich would sign a consent form authorizing a donation from Bradley's body. ER 101. Wright disputes Menchel's story. She had no idea

whether Robert Gierlich would consent to donate. She never discussed the issue of consent with him. She never spoke to Menchel or any other King County representative in the days after Bradley Gierlich's death. ER 268-269.

If such had occurred, Wright would have responded that Robinette Amaker planned to come to town to handle funeral arrangements. She would have directed that person to speak to Ms. Amaker about any organ donation. ER 269.

Menchel claims that he mailed Robert Gierlich a letter with a blank consent form for signature. ER 101. Again, nothing in the file documents that anyone ever sent or received such a letter. The defense has never produced a copy of either the proposed consent form or the letter.

Robert Gierlich and Robinette Amaker never granted permission to donate anything from Bradley Gierlich's body. Nonetheless, without any written or verbal consent from anyone, Menchel sent Bradley Gierlich's brain to SMRI, along with spleen and liver segments, glands, the cerebral dura and bodily fluids. Menchel also sent confidential documents from the KCME file to SMRI. ER 101, 229-230, 234-238, 253, 255-256, 258-259.

D. Robinette Amaker Handled the Disposition of Bradley Gierlich's Remains According to His Wishes

The mother of Bradley Gierlich and Robinette Amaker died of lung cancer in February of 1995. ER 136. Shortly after her funeral, members of the family gathered and discussed their wishes for funeral and other post mortem arrangements in the event of their deaths. The meeting included Robert Gierlich, Bradley Gierlich, Chris Amaker (Robinette's husband), Theresa Wright and Brienne Strutton (Robinette's daughter). ER 264. The family wanted to ensure that the others knew of their wishes in the event of their death, and wanted to see that such wishes would be carried out. They felt that such knowledge would make it easier on their survivors. ER 264.

As a result of that meeting, Robinette Amaker assumed responsibility to carry out the wishes of Robert Gierlich and Bradley Gierlich. Specifically, Bradley wished to be cremated and buried near his mother in Minnesota. ER 264. The family also discussed organ donation at this meeting. Bradley told Amaker that he could not donate organs because he had hepatitis. ER 131, 264.

At the time of Bradley's death, Robert Gierlich suffered from a neurological condition known as CADASIL. This condition causes

symptoms similar to Alzheimer's disease. ER 266. Victims suffer early and recurring strokes, as well as cognitive defects that can lead to early dementia. ER 95. Consequently, Robert lacked capacity to consent to donate from Bradley's body even if KCME had asked him. ER 266.

Robinette Amaker received a call from her maternal aunt, Theresa Wright, and learned that Bradley had died. Amaker told her father, who became very upset. They discussed the trip to Seattle to handle Bradley's remains. Robert Gierlich did not want to come to Seattle. They had already discussed burying Bradley in Minnesota. Robert Gierlich planned to meet Amaker there. ER 135.[2]

Amaker made immediate arrangements to fly to Seattle, arriving on October 15, 1998. Upon her arrival, she promptly worked with KCME to have Bradley's body cremated at American Memorial Funeral Home. KCME listed Amaker as the informant on Bradley's death certificate. ER 138, 186, 250, 265.

Cremation occurred on or about October 16, 1998. On October 17, 1998, Ms. Amaker personally transported her brother's

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[2] Ms. Amaker had concerns about Robert Gierlich's ability to fly. His CADASIL had made him start to decompensate mentally. He would get lost while driving. Robert's brother Roger, helped make sure that Robert got on to the proper bus to make it to the airport to make it Minnesota. ER 135-136.

ashes to Minnesota for burial near their mother's grave. ER 264-265.

No representative from KCME ever discussed the SMRI program with Robinette Amaker. No one from KCME ever asked her for permission to harvest any of Bradley's body for research. If they had done so, Amaker would have refused. She had already committed to fulfill Bradley's wishes. ER 265.

E. Robinette Amaker Did Not Discover the Defendants' Misconduct Until 2005

Robert Gierlich died in 2004. Ms. Amaker took care of post mortem arrangements for him as they had discussed in 1995. ER 130-131.

In January or February of 2005, reporter Kevin Wack, from Portland, Maine, e-mailed Ms. Amaker. He inquired whether she knew if her brother had his brain removed for any purpose after death. ER 143. She called Wack and learned that KCME had taken her brother's brain and shipped it to SMRI without consent. She learned that KCME had shipped additional body parts after litigation in the present case started. She did not learn that Menchel admitted he harvested and shipped Bradley Gierlich's body parts without consent until she read Menchel's Summary Judgment Declaration. ER 263.

2. Procedural History

On August 19, 2005, plaintiff sued King County, SMRI and Torrey in Pierce County Superior Court. ER 3-13. On August 25, 2005, defendants SMRI and Torrey removed the action to the United States District Court for the Western District of Washington at Seattle. ER 1-15. SMRI and Torrey answered on September 20, 2005. ER 16-22. King County answered on September 21, 2005. ER 23-31.

On March 13, 2006, the district court granted plaintiff's motion to amend her complaint. ER 32-33. Plaintiff filed her amended complaint on March 15, 2006. ER 34-44. The defendants answered that complaint on May 10, 2006. ER 45-51.

King County, SMRI and Torrey moved for summary judgment dismissal of all claims on October 19, 2006. ER 52-76. They supported the motion with the declaration of Donald Reay, MD (ER 75-92), the declaration of E. Fuller Torrey, MD (ER 93-96), the declaration of Sigmund Menchel, MD (ER 98-107), and the declaration of Grant S. Degginger (ER 108-159).

The motion urged dismissal on the following grounds:

- That plaintiff could not sue for violation of the Washington Anatomical Gift Act (WAGA) because she was not Bradley

Gierlich's next of kin at the time of Bradley Gierlich's death. ER 59-62.

- Plaintiff could not sue for negligence because the defendants owed her no duty. ER 62-65.
- Plaintiff could not establish outrage. ER 65-66.
- Plaintiff could not sue for common law invasion of privacy because she was not Bradley Gierlich's next of kin when he died. ER 66-67.
- Plaintiff could not sue based on a property interest of Bradley Gierlich's body because she was not his next of kin at the time of his death. ER 67-68.
- Washington did not recognize plaintiff's claim for tortious interference with a dead body under Restatement (Second) of Torts § 868. ER 68-69.
- Plaintiff could not sue for conversion because she had no property interest in Bradley Gierlich's body. ER 69-70.
- Plaintiff could not sue under the Consumer Protection Act because she did not meet the requirements of the statute. ER 70-72.
- Plaintiff could not sue for civil conspiracy because the

defendants entered into a legal agreement. ER 72-73.

Plaintiff supported her opposition to the motion with the declarations of Robinette Amaker and Theresa Wright, and the declaration of Jeremy A. Johnston, with attached documents. ER 204-269.

In response to the motion, Amaker conceded dismissal of the outrage, negligent infliction of emotional distress and Consumer Protection Act claims. She resisted dismissal of the claims for invasion of privacy, common law interference with a corpse, violation of the WAGA and civil conspiracy. ER 161.

Plaintiff asserted the following arguments against the motion:

- That Robinette Amaker, as a member of Bradley Gierlich's immediate family, had standing to pursue damages for violation of the right to privacy. ER 167-168.
- That Robinette Amaker, as a "near relative" of Bradley Gierlich, and a person with a particular interest in seeing to the funeral arrangements for her brother, had standing to pursue claims for wrongful handling of his remains. ER 170-171.
- That Robinette Amaker had standing to sue under the WAGA because Robert Gierlich was not available at the time King

County sought consent. ER 171-173.

- That the court should adopt Restatement (Second) of Torts § 868, and that Robinette Amaker had standing to sue under that theory. ER 173-175.
- That the defendants engaged in a civil conspiracy by combining to accomplish a lawful purpose by unlawful means. ER 175-176.
- That under the discovery rule, the causes of action against the defendants did not accrue until Robinette Amaker learned of defendants' wrongful conduct. ER 176-180.

The trial court heard oral argument on February 13, 2006. VRP 1-28.[3] During the course of oral argument, the court inquired whether the WAGA created a cause of action. VRP 8. Counsel for Respondent argued negatively. VRP 8-9. Plaintiff's counsel requested the opportunity to brief the issue. VRP19.

On February 23, 2007, the district court entered its order denying in part and granting in part the defendants' motion for summary judgment. ER 312-321. The court's ruling included the

[3] The district court expressed puzzlement at why the defense removed the case to federal court, causing her to interpret state statutes. VRP 28.

following:

- That Robert Gierlich was not available at the time of death. ER 317.
- That Amaker, therefore, had standing to sue under the WAGA. ER 317.
- That the parties should submit supplemental briefing on whether the WAGA supported a cause of action. ER 317-318.
- That the court would not adopt a cause of action under the Restatement (Second) of Torts § 868. ER 318.
- That Amaker did not plead a claim for tortious interference with a corpse based on Washington common law and could not amend her complaint to do so. ER 318.
- That Amaker did not state a claim for invasion of privacy. ER 319-320.
- That Amaker did not state a claim for civil conspiracy. ER 320-321.

Pursuant to the court's directive, the parties submitted supplemental briefs regarding whether the WAGA supported a cause of action for damages. ER 322-326, 354-358. Amaker also moved for reconsideration of the court's dismissal of the common law claims

for tortious interference with a corpse. ER 327-353.

The court denied the motion for reconsideration on March 2, 2007. ER 359-362. The court agreed that Amaker had pleaded a common law cause of action for tortious interference with a corpse. ER 360. However, the court concluded that the plaintiff lacked standing, ruling that she "did not have the right to control the disposition of Bradley's remains . . ." ER 361.

The court entered a second order on March 2, 2007, ruling that the WAGA did not support a cause of action, and dismissed the case. ER 363-365.

Plaintiff filed a timely notice of appeal on March 26, 2007. ER 367-385.

Plaintiff moved the Ninth Circuit to certify the case to this court on January 25, 2008. Oral argument occurred on July 10, 2008. On August 26, 2008, the Ninth Circuit entered its Order Certifying Questions to the Washington Supreme Court. *See* Appendix 1. On August 27, 2008, this court accepted the Ninth Circuit's certification.

IV. ARGUMENT

1. Relatives and Those Who Control the Right to Dispose of the Body of the Deceased Have Standing to Sue for Tortious Interference with a Corpse

The tort of interference with a dead body found its genesis in Washington cases decided early in the last century. *Wright v. Beardsley,* 46 Wash. 16, 20, 89 P. 172 (1907); *Gadbury v. Bleitz*, 133 Wash. 134, 233 P. 299 (1925).

This court in *Adams v. King County*, Docket No. 81028-1 (September 25, 2008)[4], described the cause of action as follows, at p. 18:

> [T]his court has recognized the common law action for tortious interference with a dead body. See *Wright v. Beardsley,* 46 Wash. 16, 20, 89 P. 172 (1907); *Gadbury v. Bleitz*, 33 Wash. 134, 136, 233 P. 299 (1925). We recently affirmed the viability of the tort in *Reid v. Pierce County*, 136 Wn.2d 195, 207, 961 P.2d 333 (1998) (citing *Wright* and *Gadbury*).

The court continued, at p. 21 (emphasis added) as follows:

> The tort of interference with a dead body allows recovery for mental suffering derived from the willful misuse of a body. *Gadbury,* 133 Wash. at 136 ("[I]f [mental] suffering is the direct result of a wilful wrong as distinguished from one that is merely negligent, then there may be a recovery.") The action is not based on a property interest in the body itself, but rather interest

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[4] See Appendix 2.

> in the proper treatment of the body. *See Herzl Congregation v. Robinson,* 142 Wash. 469, 471, 253 P. 654 (1927) (recognizing generally "that there is a right of custody over, and interest in, a dead body, and the disposal of the body"); *Wright,* 46 Wash. at 19 ("the action is for a wrong against the feelings of the plaintiffs inflicted by a wrongful and improper burial of their dead"). **The interest extends to the relatives of the deceased and those who control the right to dispose of the body.** *See Gadbury,* 133 Wash. at 139 ("those persons who by relationship have a peculiar interest in seeing that the last sad rights are properly given the deceased may maintain the action."); RCW 68.50.160(3).
>
> While the parameters of the misuse that gives rise to a cause of action for tortious interference may be difficult to grasp firmly, this court may have best described it as misuse "in such a manner as to cause the relatives or persons charged with its decent sepulture to naturally suffer mental anguish." *Wright,* 46 Wash. at 20. Furthermore, we need not attempt to define more precisely the nature of such misuse as the extent or nature of the interference allegedly does not bar recovery. *See Gadbury*, 133 Wash. at 137-38 ("[T]he extent or degree of the misuse ought not to prevent recovery.")

Adams involved a claim by a mother of a deceased son that King County and SMRI misled her in gaining consent to harvest body parts from her son's remains. The plaintiff contended that she gave consent for only a small piece of "brain tissue." As in the case at bench, the defense took the entire brain, pieces of spleen and liver, and other bodily parts and fluids. *Adams,* at 2. The court

characterized this behavior as follows, at p. 22:

> We believe that the unauthorized removal of a brain for use in scientific research involves the same kind of interference that causes mental suffering as would an improper burial or use of a body as collateral for payment of a debt. The permanent removal of the entire brain certainly can be considered a mutilation of the body. Further, as mother of the deceased, Adams falls within the recognized category of plaintiff who can maintain a claim for mental suffering from such misuse. *See Wright,* 46 Wash. at 20 ("'that mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated is too plain to admit of argument.'") (quoting *Larson v. Chase,* 47 Minn. 307, 312, 50 N.W. 238 (1891)).

The question of standing did not arise in *Adams* because the plaintiff mother was the deceased son's next of kin. However, in a telling passage, the *Adams* court ruled that the right to sue "extends to relatives of the deceased **and** those who control the right to dispose of the body." (Emphasis added) *Adams,* at 21. Thus, contrary to the argument of the defense and the ruling of the district court, RCW 68.50.160(3) alone does not control who may sue. While a person who has right to disposition of the remains pursuant to that statute may sue, *Adams* explains that "relatives of the deceased" may also sue. *Id.*

Robinette Amaker clearly qualifies as a "relative" of Bradley

Gierlich. She is his sister and sole surviving family member. She personally worked with KCME to arrange for his cremation. She personally transported his remains to Minnesota and arranged for his burial and funeral there. At the time of Bradley's death, the only members of his immediate family that survived him were his father, Robert Gierlich, and Amaker. At the time the defendants' wrongdoing came to light, only Amaker survived Bradley.

In ruling upon standing, the court must bear in mind that KCME had full knowledge that it needed to obtain consent from Bradley Gierlich's next of kin. The record, when viewed most favorably to Robinette Amaker, reveals that KCME made no effort to obtain consent and took Bradley Gierlich's body parts without any consent whatsoever. If one considers Menchel's evidence, any effort that he made fell far short of the requirements of RCW 68.50.550(3).

This statute requires that an anatomical gift from a person other than the owner must be made by a document of gift signed by a gift or the person's telegraphic, recorded telegraphic, other recorded message or other form of communication contemporaneously reduced to writing and signed by the recipient of the communication. Neither King County nor SMRI can produce anything showing

compliance with this statutory consent requirement. Therefore, as in *Adams*, "[t]hese facts clearly support an action for mental suffering based upon the alleged misuse of a body." *Adams*, at 24.

This court should conclude that Robinette Amaker, as a close relative of Bradley Gierlich at the time of his death, and as the next of kin at the time the defendants' wrongdoing emerged, had standing to sue for the tortious interference with Bradley's corpse.

This court should therefore answer certified question number one "no." The relatives of the deceased and the person with the statutory right to disposition of the body have standing to sue for tortious interference.

2. If One Must Have the Legal Right to Dispose of the Remains of the Deceased in Order to Sue for Tortious Interference With a Corpse, Amaker Had Standing by Virtue of Her Right to Make an Anatomical Gift of All or Part of Bradley Gierlich's Remains

In its order certifying questions to the Washington Supreme Court, the Ninth Circuit observed the following, at p. 11719:

> Likewise, the court may wish to consider the interplay between the Anatomical Gift Act and claims for tortious interference with a corpse. For example, under the district court's analysis Amaker does not have standing to bring a tortious interference claim because she was not the "next of kin" and did not have the right to dispose of Bradley's remains. *See Amaker*, 479 F. Supp. 2d at 1161-62. On the other hand, the district

> court found that Amaker had standing to bring a claim under the WAGA, because Robert was "unavailable" at the time of Bradley's death, and therefore she was capable of consenting to the donation. *See Amaker,* 479 F. Supp. 2d at 1156-57. Thus, Amaker argues there is tension between the two holdings: she was legally permitted to donate Bradley's organs, but she did not have the legal right to dispose of the body.

This court in *Adams* has resolved the issue of standing. *Adams*, at 21. However, in the event that the court deems that Amaker does not fit within the class of "relatives" with standing, the court should resolve the conflict created by the district court's view of the interplay between RCW 68.50.160 and 68.50.500, *et seq.*

In Washington, courts must read statutes relating to the same subject matter together to give each effect and to harmonize each with other. *Harmon v. DSHS,* 134 Wn.2d 523, 951 P.2d 770 (1998). Courts read legislation to give effect to every word and not to render any language superfluous or absurd. *City of Seattle v. Williams*, 120 Wn.2d 341, 349, 904 P.2d 359 (1995). Courts must assume that the legislature does not intend to create an inconsistency in a statute. Therefore, courts seek to avoid interpreting a statute in a way that leads to inconsistency. *Lutheran Daycare v. Snohomish County*, 119 Wn.2d 91, 103, 829 P.2d 746 (1992), cert. denied, 122 L.Ed.2d 353 (1993). Courts avoid forced, unlikely or strained interpretations of

statutes. *State v. Elgin*, 118 Wn.2d 551, 555, 825 P.2d 314 (1992).

The district court decided that Robinette Amaker "did not have the right to control the disposition of Bradley's remains . . ." ER 361. At the same time, the court ruled that Ms. Amaker had standing to make an anatomical gift of Bradley's remains at the time of his death pursuant to RCW 68.50.530(1). ER 316-317.

An "anatomical gift" means "a donation of all or part of a human body to take effect upon or after death." RCW 68.50.530(1). RCW 68.50.550(1)(f) authorized Ms. Amaker to "make an anatomical gift of all or part of the decedent's body for an authorized purpose . . ." Thus, Ms. Amaker, at the time of Bradley's death, had the legal right to dispose of "all or part of" Bradley's remains "for transplantation, therapy, medical or dental education, research, or advancement of medical or dental science . . ." RCW 68.50.570(1)(a).

The district court apparently recognized the inconsistency created by its ruling. To resolve the conflict, the court held that RCW 68.50.160(3) "does not have an availability requirement." ER 361. This comment begs the question. If Robert Gierlich was "unavailable" how could he have the right to dispose of Bradley's remains? If he

was incompetent, how could he do so? If Robinette Amaker could donate "all or part of" Bradley's remains, how could one rationally say she had no right to "disposition" of the same? How could Amaker have the right to donate "all or part of" Bradley's organs and Robert have the right to disposition of his remains at the same time? The district court left these and other questions unanswered, and made no effort to harmonize the statutes. Surely the Washington legislature had no intent of creating such an unsettled state of affairs. The court's ruling will thwart the statutory goal of facilitating organ donation, and foster needless post mortem conflict and litigation.

As the Ninth Circuit stated (Appendix 1 at 11719):

> [I]t may be that each law is aimed at remedying different harms, it may be that both the common law claim and the statute allow for recovery in this instance, or it may be that neither the common law claim nor the statute allows for recovery in this particular situation. In any event, we leave it for the Washington Supreme Court to decide.

Both RCW 68.50.160 and 68.50.550 address disposition of the remains of the deceased. Where two sections of the same statute deal generally and specifically with the same subject matter, the more specific statute should control. *Tunstall v. Bergeson*, 141 Wn.2d 201, 5 P.3d 691 (2000).

Organ donation under RCW 68.50.550 presents a more specific means of "disposition" of the remains of the deceased than disposition under RCW 68.50.160. Consequently, to the extent the two statutes conflict, RCW 68.50.550 should control. Therefore, Amaker had standing (if RCW 68.50 controls standing) to sue, under the district court's analysis. Such a determination will advance the legislative intent to facilitate organ donation, and eliminate any post mortem discord.

3. Under the Discovery Rule, the Causes of Action Against the Defendants Did Not Accrue until Robinette Amaker Learned of the Defendants' Wrongful Conduct

The district court disregarded the fact that KCME and SMRI concealed their wrongful harvesting, shipment and receipt of Bradley Gierlich's body parts until after Robert Gierlich died.[5] Amaker requested that the court rule that the cause of action did not accrue in Robert Gierlich's lifetime because he did not learn of the misconduct before he died. ER 176-180.

The court denied this request, ruling that "the discovery rule only operates to toll an applicable statute of limitations, it does not

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[5] Amaker offers this discussion in case the court rules that she needed the statutory right (under RCW 68.50.160(3)) to disposition of Bradley's remains in order to sue.

create standing for a plaintiff who otherwise does not have it." ER 362. This ruling leaves the impact of accrual on Amaker's cause of action unresolved. ER176-180. This ruling did not conform with Washington law.

This court has noted that courts have the responsibility to develop the common law in response to social or technological changes, and to fine tune the law to be more just. *Burkhart v. Harrod*, 110 Wn.2d 381, 394, 755 P.2d 759 (1988). In that case, the court stated, in footnote six, at 394-395:

> When over-arching principles of justice are not accommodated by traditional theories of tort recovery, we do not hesitate to take measured steps to advance more just theories of tort recovery, as can be seen in cases such as *Martin v. Abbott Labs.*, 102 Wn.2d 581, 689 P.2d 368 (1984).

In *1,000 Virginia Ltd. P'ship. v. Vertecs Corp.*, 158 Wn.2d 566, 146 P.3d 423 (2006) court stated the following, at 579:

> "In determining whether to apply the discovery rule, the possibility of stale claims must be balanced against the unfairness of precluding justified causes of action." *U.S. Oil*, 96 Wn.2d at 93; *Gunnier v. Yakima Heart Ctr., Inc.*, P.S., 134 Wn.2d 854, 860, 953 P.2d 1162 (1998). A court must consider the goal of the common law "to provide a remedy for every genuine wrong" while recognizing, at the same time, that "compelling one to answer stale claims in the courts is in itself a substantial wrong."

In Washington, a cause of action does not accrue until a party knows or should know the essential elements of the cause of action - duty, breach, causation and damages. *Green v. A. P. C.*, 136 Wn.2d 87, 95, 960 P.2d 912 (1998). The rule applies where a defendant fraudulently conceals a material fact from the plaintiff and thereby deprives the plaintiff of the knowledge of accrual of the action. *Crisman v. Crisman*, 85 Wash.App 15, 20, 931 P.2d 163, *rev. denied*, 132 Wn.2d 1008 (1997). That occurred in the case at bench.

The district court correctly observed that the discovery rule applies to statutes of limitations issues. However, the concept of accrual supports the conclusion that Robert Gierlich could never sue because he died before the wrongdoing came to light. His action therefore never accrued during his lifetime. Ruling otherwise, the district court rewarded the defendants' wrongful behavior and left a genuine wrong seeking a remedy.

In addition, at the time she learned of the harvesting, shipment and receipt of Bradley Gierlich's body parts, Amaker was Bradley's next of kin entitled to control disposition of his remains. RCW 68.50.160(3). At that point, she also had authority to make a donation of "all or a part" of his body. RCW 68.50.550(1)(f). Because SMRI

currently retains some of Bradley's body parts, Amaker remains in control of his remains for all purposes authorized by the two statutes.

In addition, at the time of learning of the harvesting, shipment and receipt of Bradley Gierlich's body parts, there is no dispute that Amaker had the authority to make an anatomical gift of all or part of Bradley Gierlich's remains because Robert was not "available." ER 317; RCW 68.50.550(1)(f); (2)(a).[6] Assuming KCME and SMRI wrongfully harvested body parts from Bradley Gierlich, Amaker still faces the decision regarding the disposition of Bradley Gierlich's remains that SMRI currently possesses. Amaker, not Robert Gierlich, suffered and continues to suffer the harm created by KCME and SMRI's wrongful conduct.

The defendants have declared, without any citation to authority, "that the time to determine standing is when the alleged wrongful act occurred, not when that act was discovered."[7] In fact, under Washington law, standing can arise at the time of discovery of a tortious act. *Green v. A.P.C.*, 136 Wn.2d 87, 960 P.2d 912 (1998).

In *Green*, the plaintiff wife suffered exposure to DES in utero.

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[6] The defendants did not appeal the court's ruling that Amaker had standing to sue under the WAGA because Robert was not "available."

[7] Appellee's Brief, p. 25.

She married in 1988. She claimed that she discovered that she suffered harm from the DES exposure in 1992. She and her husband filed suit against the manufacturers of the drug, including a claim for loss of consortium.

With respect to the husband's claim, this court had to decide whether the husband could claim for damages resulting from a tortious act that occurred before the marriage. The court rejected arguments that Mr. Green "married into" the injury. *Green,* at 101-102. However, the court allowed the cause of action as a matter of fundamental fairness, at 102:

> The best argument for rejecting the majority rule, however, is its fundamental unfairness in the toxic exposure context. Loss of consortium damages should be available for premarital injury if the injured spouse either does not know or cannot know of the injury. Although still a distinct minority, several courts have recognized this principle in toxic tort cases. [Citations omitted]. We now join those courts and hold that Joshua Green's claim for loss of consortium accrued when he knew or should have known the essential elements of his claim. Because we decline to apply an absolute bar to premarital injuries if the spouse seeking a loss of consortium claim could not know of the harm, we remand the case to the trial court where Mr. Green will have the burden of proving both when he first experienced the loss and what damages he suffered.

The court, at footnote 9, emphasized the importance of accrual in establishing a cause of action, at 102 as follows:

> The Court of Appeals held "a spouse's loss of consortium claim cannot accrue until the other spouse's claim, on which the loss of consortium depends, has also accrued." *Green,* 86 Wn.App., at 68. This is incorrect. The spouse's loss of consortium claim accrues when the spouse first suffers injury from loss of consortium, regardless of when the other spouse's injury claim accrues. *Richelt*, 107 Wn.2d, at 776.

Green demonstrates the district court's error in the case at bench. The spouse in *Green* obviously would have had no standing to sue for loss of consortium if "the time to determine standing is when the alleged wrongful act occurred, not when that act was discovered." Obviously, a spouse does not have standing to sue for future injuries as his future wife gestates in her mother's womb. Instead, the spouse in *Green* had no cause of action until he discovered the elements of his cause of action, including the fact of injury. At that moment, the action accrued and he had standing.

The court's analysis of Joshua Green's claim did not turn upon whether his statute of limitations had expired. Nonetheless, the court invoked the discovery rule and the related concept of accrual to determine that he had a right to sue. The court implicitly granted him standing once his cause of action accrued after he discovered the harm that he had suffered from the defendant's tort.

Joshua Green's claim turned upon policy considerations

related to fairness as well as the concept of accrual. The court found it unfair to preclude his claim where he "could not know of the harm . . ." *Green*, at 102. Similar considerations of fairness should apply here. Menchel took Bradley Gierlich's brain and other body parts admittedly without consent. KCME personnel never asked Robinette Amaker for consent, despite the fact that she came to KCME office to arrange cremation of Bradley's remains. KCME never told Amaker that Menchel had supposedly sent Robert Gierlich a letter and consent form seeking permission for donation of Bradley's body parts. As Amaker stood in the KCME office and arranged for Bradley's cremation, KCME never told her that it had removed parts of Bradley's body and sent them to SMRI.

SMRI retained Bradley Gierlich's brain and body parts without consent. Over the next seven years, neither KCME nor SMRI made any effort to follow through to gain consent. They never told the family they had Bradley's remains. Robert Gierlich and Robinette Amaker simply had no way to know what the defendants had done until newspaper investigations revealed the truth after Robert's death.

As a result, Bradley Gierlich's "next of kin" never had a cause of action until the discovery of the wrongdoing of SMRI and KCME.

Robert Gierlich, therefore, never had a cause of action because it did not accrue during his lifetime. There existed no known set of facts that could have empowered him to apply the court for relief.

In 2005, when the defendants' wrongdoing came to light, the action accrued into something that could support a claim for relief. At that time, Robinette Amaker was next of kin with the right to dispose of Bradley's remains.[8] Her discovery of the facts caused her claim to accrue, and prevented the statute of limitations from causing dismissal.

Thus, the concept of accrual and the discovery rule do more than merely extend the time "in which an existing cause of action can be brought." *Green* demonstrates that an action that did not exist can mature once a claimant learns of facts sufficient to support a claim for relief. Consequently, if the discovery rule and the concept of accrual support creation of a cause of action for loss of consortium for an injury to a spouse that occurred before the birth of his wife, they support a cause of action for tortious interference with a corpse in favor of the next of kin alive at the time of accrual.

In summary, if one must have the statutory right to control

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[8] RCW 68.50.160(3)(d); RCW 68.50.550(1)(f).

disposition of the remains of the deceased in order to sue for tortious interference, Robinette Amaker had that right at the time of death and at the time she discovered the defendants' misconduct in 2005. The district court therefore erred in dismissing the case. If this court answers certified question one "yes," then it should also answer "yes" to certified question two.

V. CONCLUSION

This court should answer the Ninth Circuit's certified question number one "no." In the event the court answers question number one "yes," then it should also answer certified question number two "yes."

DATED this 29th day of September 2008.

MESSINA BULZOMI CHRISTENSEN

By _____

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBINETTE AMAKER,
Plaintiff-Appellant,
v.
KING COUNTY, a municipal corporation; STANLEY MEDICAL RESEARCH INSTITUTE, a foreign corporation; E. FULLER TORREY,
Defendants-Appellees.

No. 07-35241
D.C. No. CV-05-01470-MJP
Western District of Washington, Seattle

ORDER CERTIFYING QUESTIONS TO THE WASHINGTON SUPREME COURT

Filed August 26, 2008

Before: Richard R. Clifton and N. Randy Smith, Circuit Judges, and Brian E. Sandoval,* District Judge.

COUNSEL

Stephen L. Bulzomi (argued), Jeremy A. Johnston, Messina Bulzomi Christensen, Tacoma, Washington, for the appellant.

Grant S. Degginger (argued), June K. Campbell, Ryan P. McBride, Lane Powell PC, Seattle, Washington, for the appellees.

*The Honorable Brian E. Sandoval, United States District Judge for the District of Nevada, sitting by designation.

ORDER

In this case arising out of diversity jurisdiction, we are asked to decide whether Robinette Amaker, the surviving sister of Bradley Gierlich, may bring suit against defendants King County, Stanley Medical Research Institute ("SMRI"), and E. Fuller Torrey, after the King County Medical Examiners Office ("KCMEO") provided Bradley's[1] brain, liver, and spleen tissue to SMRI for use in medical research without obtaining consent from either Bradley or his next of kin.

The issues that we address here relate to Amaker's first two causes of action. The district court concluded that Amaker, as Bradley's sister, lacked standing to raise a claim for tortious interference with a corpse. At the time of Bradley's death his next of kin, as defined by the Revised Code of Washington ("RCW) § 68.50.160, was Robert Gierlich, Bradley's father. The district court concluded that Robert was the only individual with the right to bring a tortious interference claim because only he had the right to dispose of Bradley's corpse. *See Wright v. Beardsley*, 89 P. 172 (Wash. 1907); *Gadbury v. Bleitz*, 233 P. 299 (Wash. 1925). Additionally, the district court dismissed Amaker's claim that the defendants violated the Washington Anatomical Gift Act ("WAGA"), RCW § 68.50.520 *et seq.* (repealed by Wash. Laws 2008, ch. 139, §31), because it concluded that the WAGA does not create an implied private right of action.

Ultimately, we conclude that the state law is unsettled with respect to both of these claims, and the answers to the questions we pose are dispositive of the issues before us. Specifically, we ask the Washington Supreme Court to determine whether Robinette Amaker, the decedent's sister, has standing to bring a claim for tortious interference with a corpse, and whether the WAGA creates a private right of action.

[1]We refer to Bradley and Robert Gierlich by their first names because they share the same last name.

I

Before addressing the questions certified to the Washington Supreme Court, we first summarize the material facts and procedural history. Bradley Gierlich died of an apparent drug overdose on October 13, 1998, in Seattle, Washington. **[ER 228.]** He was survived by his father, Robert Gierlich, his sister, Robinette Amaker, and his aunt, Teresa Wright. Robert and Amaker lived in Florida at the time, while Wright lived in Seattle. Bradley died intestate and left no instructions to his surviving family members as to the disposition of his remains.

Because of the circumstances surrounding Bradley's death, King County took possession of Bradley's body and KCMEO pathologist, Dr. Menchel, performed an autopsy on Bradley's body. *See* RCW § 68.50.010. At the time of the autopsy, Dr. Menchel attempted to contact Bradley's next of kin, Robert, in order to get consent to donate some of Bradley's organs and tissues for research. Dr. Menchel was unable to reach Robert in Florida despite numerous attempts to contact him by telephone. Although Dr. Menchel admits that he was unable to reach Robert, he claims that he spoke extensively with Wright about Bradley's medical history and the organ donation process. **[ER 101.]** Dr. Menchel contends that he received assurance from Wright that Robert would consent to the organ donation.[*Id.*] Because of these assurances, Dr. Menchel sent Robert a consent form via mail and proceeded to harvest the organs, on the assumption that Robert would eventually agree to donate his son's organs. Wright does not recall having a discussion with Dr. Menchel and she says that she would not have indicated that Robert was willing to consent to organ donation. **[ER 268-69.]** In any event, it is undisputed that KCMEO sent parts of Bradley's brain and other tissue to SMRI without first obtaining consent from Robert Gierlich.

KCMEO also failed to obtain Amaker's consent to donate Bradley's organs despite the fact that Amaker was in Seattle

shortly after Bradley's death in order to attend to the funeral arrangements. **[ER 135.]** Amaker alleges now that she would not have consented to the organ donation had they asked because Bradley, before his death, indicated that he did not wish to have his organs donated.

Amaker learned of the disposition of Bradley's remains years later when a reporter contacted her and asked whether Bradley's brain had been used for research. **[ER 143.]** The reporter told Amaker that he was investigating allegations that brains were being harvested without family consent in order to study schizophrenia and bipolar disorder. **[Id.]** This prompted her to investigate further, and Amaker found that her brother's tissue had been provided by KCMEO to SMRI for research without any record of anyone in her family consenting to the donation. **[ER 144.]** Upon learning that SMRI had Bradley's brain tissue, Amaker requested that they test the tissue for CADASIL, a degenerative brain disease that had afflicted her father before his death in 2005. **[ER 144.]** When her brother's sample showed that he too was afflicted with CADASIL before his death, Amaker began taking preventative medication in order to ward off the effects of the disease. **[ER 145.]**

Amaker then filed suit against King County, SMRI, and the Director of the Stanley Brain Research Laboratory, E. Fuller Torrey, in Pierce County Superior Court on August 19, 2005 alleging violations of state law tortious interference with a corpse, negligent infliction of emotional distress, conversion, civil conspiracy, invasion of privacy, violations of the WAGA, and the consumer protection act. The defendants removed the case to federal district court in the Western District of Washington. Prior to summary judgment, plaintiff conceded dismissal of all claims except the claims for common law interference with a corpse, civil conspiracy, invasion of privacy, and violations of WAGA.

The district court granted summary judgment to the defendants on Amaker's invasion of privacy claim and the civil

conspiracy claim because harvesting and shipping Bradley's brain did not constitute "publicity" and because there was no evidence that SMRI and KCMEO agreed to unlawfully harvest organs without donor consent. *Amaker v. King County*, 479 F.Supp.2d 1151, 1157-59 (W.D. Wash. 2007). In a subsequent order, the district court acknowledged that the plaintiffs had sufficiently pled a state law tortious interference with a corpse claim, but concluded that Amaker lacked standing to pursue the claim because she was not Bradley Gierlich's next of kin at the time of his death. *Amaker v. King County*, 479 F.Supp.2d 1159 (W.D. Wash. 2007). Finally, the district court granted summary judgment in favor of the defendants because it concluded that the WAGA did not create an implied private right of action. *Amaker v. King County*, 479 F.Supp.2d 1162 (W.D. Wash. 2007). Amaker appealed the district court on all remaining claims. We dispose of Amaker's invasion of privacy and civil conspiracy claims in a memorandum disposition filed concurrently with this order. We now turn to the questions to be certified to the Washington Supreme Court.

II

A

The first issue we confront is whether Amaker, as the decedent's sister, is among the class of individuals that has standing to bring a claim for tortious interference with a corpse under Washington law. RCW § 2.60.020 permits us to certify questions of state law to the Washington Supreme Court when "it is necessary to ascertain the local law of [the] state in order to dispose of such proceeding and the local law has not been clearly determined." We certify this question to the Washington Supreme Court because we conclude that the Washington law on this question is unsettled and because the answer to the question is dispositive of Amaker's common law claim.

To begin with, it may help to place this issue in context. There are at least two general approaches to the problem of

who may bring a claim for tortious interference with a corpse. The traditional approach to standing, most commonly associated with the Restatement of Torts, identifies the tort as a claim deriving from a "quasi-property" right. *See Carney v. Knollwood Cemetery Ass'n*, 514 N.E.2d 430, 434 (Ohio Ct. App. 1986). Under this theory, the decendent's survivors have the right to bury or otherwise dispose of the body without interference, and the cause of action is somewhat analogous to tortious interference with a contract. *Id.* In order to bring a claim under this theory, the person bringing the suit must have the legal right to disposition of the body: "[o]ne who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon a body of a dead person or prevents its proper interment or cremation is subject to liability to *a member of the family of the deceased who is entitled to the disposition of the body.*" *Id.* (citing 4 Restatement (Second) of Torts § 868 (1979)) (emphasis added).

A number of jurisdictions have followed this theory, and most have concluded that only the class of people designated either by statute or common law as the "next of kin" may bring a claim for interference with a corpse. *See, e.g., O'Dea v. Mitchell*, 213 N.E.2d 870, 872 (Mass. 1966) ("The absence of a surviving spouse and of contrary directions by the decedent must be alleged by the next of kin in order to establish their standing to sue."); *Siver v. Rockingham Mem'l Hosp.*, 48 F.Supp.2d 608, 612 (W.D.Va. 1999) ("[S]tanding is derivative of the exercised right to possess, preserve, and bury a corpse" and because "each plaintiff falls within the class of 'next of kin' articulated by the statutes relating to disposition and burial of a corpse" they may each bring a claim for interference with a corpse.); *Whaley v. County of Saginaw*, 941 F.Supp. 1483, 1491 (E.D.Mich. 1996) (concluding that under Michigan law, only those that are the "next of kin," as defined by the Michigan Supreme Court, has standing to sue for mutilation of a body); *cf. Allinger v. Kell*, 302 N.W.2d 576, 579 (Mich. Ct. App. 1981), *rev'd on other grounds*, 309 N.W.2d 547 (Mich. 1981); *Wages v. Amisub of Georgia*, 508 S.E.2d

783, 785 (Ga. App. 1998) (concluding that the theory of interference with a corpse was based upon quasi-contract right and that without a contract for funeral services, plaintiffs could not state a claim for tortious interference with a corpse).

Courts in other jurisdictions have moved away from this approach and recognized that other close family members generally can bring suits for interference with a corpse under a subspecies of the tort of infliction of emotional distress. *Carney,* 514 N.E.2d at 435. Under this theory the claim is not based on "a property right in a dead body but in the personal right of the family of the deceased to bury the body." *Id.* (citations omitted). These jurisdictions now conclude that any "close" or "immediate" member of the decedent's family may bring suit for tortious interference with a corpse. *See, e.g., id.* (rejecting "the theory that a surviving custodian has quasi-property rights in the body of the deceased, and acknowledg-[ing] the cause of action for mishandling of a dead body" but declining to define precisely which class of family members has standing); *Christensen v. Sup. Ct. of Los Angeles*, 820 P.2d 181, 183 (Cal. 1992) (concluding that the class of plaintiffs with standing to sue went beyond those "who have the statutory right to control disposition of the remains and those who contract for disposition," to include those "close family members who were aware that the funeral . . . services were being performed"); *Contreraz v. Michelotti-Sawyers*, 896 P.2d 1118, 1122 (Mont. 1995) (holding that "close relatives," including children and grandchildren, have standing to sue).

Identifying the correct rule in Washington matters here because at the time of Bradley's death, his next of kin was his father. *See* RCW § 68.50.160(3). It was Robert, and not Amaker, that had the right and duty to dispose of Bradley's remains. If only the "next of kin" may bring a claim for tortious interference with a corpse in Washington, Amaker does not have standing. If, however, Washington recognizes a broader class of claimants, including other close relatives, then Amaker likely has standing.

Neither the Washington courts, nor the state legislature, have identified which theory of liability applies to these claims in Washington. At best, we are left to divine the Washington standing rule based upon some cryptic wording in two cases from the early twentieth century. In *Wright v. Beardsley*, the Washington Supreme Court noted that "[t]he persons who are the lawful custodians of a deceased body may maintain an action for its desecration." 89 P. 172, 173 (1907). Similarly, in *Gadbury v. Bleitz*, the Supreme Court noted that the right to maintain an action for interference with a corpse could vest in the mother of the decedent, because she was one responsible for disposition of the body. 233 P. 299, 300 (1925); *see also Herzl Congregation v. Robinson*, 253 P. 654, 473 (Wash. 1927) (adopting the proposition that "the right to bury a corpse . . . belongs exclusively to the next of kin"). In both cases the parent or parents of the decedent, as the decedent's next of kin, were permitted to bring suit for tortious interference with a corpse.

Although the seminal Washington cases establishing the common law tort of interference with a corpse allude to a more limited standing class, more recent Washington cases have suggested contradictory standards. In *Jacobs v. Calvary Cemetery & Mausoleum*, 765 P.2d 334, 335 (Wash. Ct. App. 1989), a cemetery negligently interred the remains of the Jacobs' five-year-old daughter. As a result, vandals were able to remove the body and leave it in a remote part of the cemetery. *Id.* The defendants contended that the parents were not entitled to sue because they were merely "bystanders." Relying upon *Wright* and *Gadbury*, the court noted that the parents could bring suit because "damage awards in this field have never been based on bystander liability, but on the violation of a duty owed to the contracting plaintiff." *Id.* at 335 n.1. *Jacobs* suggests that Washington courts may continue to recognize a limited approach to standing like that established in the Restatement.

On the other hand, the Washington Supreme Court has recently suggested that tortious interference with a corpse

claims may be brought by family members other than those that have the right to dispose of the decedent's remains. In *Reid v. Pierce County*, 961 P.2d 333 (Wash. 1998) (en banc), the court alluded to the fact that the plaintiffs, including the decedent's surviving niece, could bring claims for tortious interference with a corpse. Although the Washington Supreme Court did not directly address the issue, the decision suggested that it might be willing to recognize a broader standing class. *Id.* at 339-40.

Although there is some language in Washington state court decisions suggesting that Washington recognizes the Restatement approach to standing, we think that the more prudent course is to seek guidance from the Washington Supreme Court itself. Therefore, we are persuaded that certification is the correct course of action here. No Washington state court has explicitly defined the class of plaintiffs with standing to bring this particular claim. When we are left without a definitive rule statement on a question of state law, like we are here, "[w]e are not making the most of our opportunity to cooperate as judicial neighbors, and we are not in tune with the requirements of judicial federalism, when we declare state law . . . without first asking the state supreme court for clarification." *Johnson v. Hawe*, 388 F.3d 676, 689 (9th Cir. 2004) (Gould, J. dissenting). In the end we conclude that it is for the state to determine who should be able to pursue this claim and what limits to impose on liability.

B

The second issue that we address is whether the WAGA creates an implied private right of action. Amaker maintains that the defendants violated the Act when they failed to obtain written consent from her prior to providing Bradley's organs to SMRI. RCW § 68.50.550(3) (repealed by Wash. Laws 2008, ch. 139, §31).[2] Amaker claims that the WAGA creates

[2]The Washington Anatomical Gift Act, RCW § 68.50.520 *et seq.*, has been repealed and revised effective June 12, 2008. The Revised Anatomi-

an implied private right of action which allows her to recover for the violation. We also certify this question to the Washington Supreme Court.

No Washington court has yet confronted the issue of whether the WAGA creates a private right of action. The only reported Washington case to consider the WAGA is a court of appeals case that construed the good faith immunity provision of the Act. *See Sattler v. Nw Tissue Ctr.*, 42 P.3d 440, 444 (Wash. Ct. App. 2002). The Washington legislature has authorized the courts to look to other jurisdictions in interpreting Uniform statutes, including the WAGA. *See* RCW § 68.50.520 (repealed by Wash. Laws 2008, ch. 139, §31); *Sattler*, 42 P.2d at 443. Unfortunately, we are unaware of any jurisdiction that has expressly addressed the question of whether the Uniform Anatomical Gift Act creates an implied right of action.

We recognize that we have been willing to decide similar questions in the past without certifying questions to the state supreme court. For example, in *Duffy v. Riveland*, 98 F.3d 447, 458-59 (9th Cir. 1996), we applied Washington law and

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cal Gift Act is substantially similar to the 1993 legislation applicable at the time of the alleged violation, although the revised legislation does not have mandatory language with respect to the consent provision. *Compare* RCW § 68.51.090 (2008) ("A person authorized to make an anatomical gift . . . may make an anatomical gift by a document of gift signed by the person making the gift or by that person's oral communication that is electronically recorded or is contemporaneously reduced to a record and signed by the individual receiving the oral communication.") *with* RCW § 68.50.550(3) (2006) ("An anatomical gift made by [an authorized family member] must be made by (a) a document of gift signed by the person or (b) the person's telegraphic, recorded telephonic, or other recorded message, or other form of communication from the person that is contemporaneously reduced to writing and signed by the recipient of the communication."). In Washington, amendments to legislation are presumed to apply prospectively only. *In re F.D. Processing, Inc.*, 832 P.2d 1303 (Wash. 1992) (en banc).

determined that another Washington statute created a private right of action without resorting to a certification order in that instance. Nonetheless, we think it prudent, given the circumstances in this case, to seek guidance from the Washington Supreme Court on this question.

The Washington Supreme Court may wish to consider these two issues in conjunction. This case presents an opportunity for the state supreme court to identify which claims may be brought in cases arising out of non-consensual organ donation. Likewise, the court may wish to consider the interplay between the Anatomical Gift Act and claims for tortious interference with a corpse. For example, under the district court's analysis Amaker does not have standing to bring a tortious interference claim because she was not the "next of kin" and did not have the right to dispose of Bradley's remains. *See Amaker*, 479 F.Supp.2d at 1161-62. On the other hand, the district court found that Amaker had standing to bring a claim under the WAGA, because Robert was "unavailable" at the time of Bradley's death, and therefore she was capable of consenting to the donation. *See Amaker*, 479 F.Supp.2d at 1156-57. Thus, Amaker argues there is tension between the two holdings: she was legally permitted to donate Bradley's organs, but she did not have the legal right to dispose of the body. The Washington court may wish to remedy this tension, or it may conclude that the policy rationales behind the common law claim and the WAGA compel this outcome. More broadly, it may be that each law is aimed at remedying different harms, it may be that both the common law claim and the statute allow for recovery in this instance, or it may be that neither the common law claim nor the statute allows for recovery in this particular situation. In any event, we leave it for the Washington Supreme Court to decide.

III

In light of the foregoing discussion, and because the answer to these questions is "necessary to ascertain the local law of

this state in order to dispose" of the issues on appeal, RCW § 2.60.020, we respectfully certify to the Washington Supreme Court the following questions:

> (1) Whether only those individuals identified as "next of kin" as defined by RCW § 68.50.160 at the time of the decedent's death have standing to bring a claim for tortious interference with a corpse?
>
> (2) If the answer to the above question is "no," whether Amaker, the decedent's sister, is within the class of plaintiffs that may bring a claim for tortious interference with a corpse?
>
> (3) Whether the Washington Anatomical Gift Act, RCW § 68.50.520 *et seq.*, creates an implied private right of action upon which Amaker may state a claim?

We do not intend our framing of the questions to restrict the Washington Supreme Court's consideration of these issues. The Washington Supreme Court, in its discretion, may choose to reformulate the questions presented. *Broad v. Mannesman Anlagenbau AG*, 196 F.3d 1075, 1076 (9th Cir. 1999).

If the Washington Supreme Court accepts review of the certified questions, we designate appellant Amaker to file the first brief pursuant to Washington Rule of Appellate Procedure 16.16 (e)(1).

The Clerk of Court is hereby ordered to transmit forthwith to the Washington Supreme Court, under official seal of the United States Court of Appeals for the Ninth Circuit, a copy of this order and all briefs and excerpts of record. RCW § 2.60.010, 2.60.030; Wash. R. App. P. 16.16.

Further proceedings in our court on the certified questions are stayed pending the Washington Supreme Court's decision

on whether it will accept review, and if so, receipt of the answer to the certified question. The case is withdrawn from submission until further order from this court. The panel will resume control and jurisdiction over the certified questions when either the Washington Supreme Court answers the certified questions or declines to answer the questions. When the Washington Supreme Court decides whether or not to accept the certified questions, the parties shall file a joint report informing this court of the decision. If the Washington Supreme Court accepts the certified question, the parties shall file a joint status report informing this court when the Washington Supreme Court issues its answers.

It is so **ORDERED.**

Chief Judge Alex Kozinski

1IN THE SUPREME COURT OF THE STATE OF WASHINGTON

NANCY ADAMS and MATTHEW, ADAMS, wife and husband,	)	No. 81028-1
Appellants,	)	
v.	)	
KING COUNTY, a municipal corporation; STANLEY MEDICAL RESEARCH INSTITUTE, a foreign corporation; and E. FULLER TORREY,	)	
Respondents,	)	En Banc
	)	Filed September 25, 2008

OWENS, J. -- This case presents the issue of whether a person who makes an undesignated anatomical gift by signing an organ donor card authorizes only a hospital to accept such a gift. We hold that the former Washington Uniform Anatomical Gift Act (WAGA), RCW 68.50.520-.620, *repealed by* Laws of 2008, ch. 139, § 31, .901-.903, allows only hospitals to accept an undesignated anatomical gift. Furthermore, we hold that while the WAGA does not provide a statutory cause of action, unauthorized use of an organ is actionable under common law theories of recovery.

Statement of Facts

Jesse Smith unexpectedly died of heart problems shortly after his 21st birthday. Shortly before he died, Jesse had renewed his driver's license and signed an attached card indicating his intent to make an anatomical gift of his organs. The card did not ask him to designate a donee for such a gift. Clerk's Papers (CP) at 268-69.

Given the suddenness of death, Jesse's body was sent to the King County Medical Examiner for an autopsy. At the time of the autopsy, the medical examiner apparently had not determined if Jesse made an anatomical gift of any kind.

Pursuant to agreement, the medical examiner shared its autopsy information with the Stanley Medical Research Institute (SMRI), a nonprofit organization located in Maryland and dedicated to supporting research of certain brain disorders. SMRI procures brain tissue for research at various facilities. The agreement between the King County Medical Examiner and SMRI (collectively Respondents) provided that SMRI would fund a pathologist position in the medical examiner's office in exchange for the procurement of brain tissue from corpses received by the medical examiner. CP at 252-57. Dr. Nabila Haikal held SMRI's funded position at the medical examiner's office at the time Jesse's body arrived for an autopsy.

On the day that Jesse died, Dr. Haikal called Jesse's mother, Nancy Adams, to ask for permission to take Jesse's brain tissue for research purposes. The parties

dispute the nature of this conversation. According to Adams, Dr. Haikal requested a small sample of Jesse's brain tissue for research.[1] Adams did not consent immediately. Dr. Haikal then spoke for several minutes with Adams's husband, Matthew Adams (Jesse's stepfather), during which Dr. Haikal assured him that SMRI did not want to remove Jesse's entire brain. Adams got back on the phone and verbally consented to donate a sample of Jesse's brain to SMRI for the purpose of medical research. Dr. Haikal completed and signed a consent form at the medical examiner's office indicating that Adams had agreed to "the removal of brain tissue" for purposes of SMRI's research support. CP at 234.

The medical examiner performed the autopsy the next day. During the autopsy, the medical examiner removed Jesse's brain along with his other organs for measurement. All the organs were replaced except for the brain, which was retained in whole and sent to SMRI. SMRI also collected tissue from Jesse's spleen and liver as well as blood and cerebral fluid samples for related research on the brain. The autopsy report stated that "[t]he brain . . . is donated to the Stanley Foundation by the family's permission for neuropathological research." CP at 274. Adams made no inquiry about the autopsy.

Over a year later, Adams learned through a Seattle television news report about

[1] While Jesse had no diagnosed brain disorder, SMRI apparently procured normal brain tissue for research.

SMRI's procurement activities at the medical examiner's office. Through this

investigation, Adams learned that SMRI had taken Jesse's entire brain and other body samples. Upon learning of this information, Adams allegedly suffered from grief and depression, requiring psychological and psychiatric treatment.

Adams filed suit against Respondents in 2006, claiming a violation of the WAGA as well as tortious interference with a dead body, invasion of privacy, conspiracy, and fraud, among other claims.[2] Respondents moved for summary judgment of all claims. Respondents argued that SMRI was authorized to accept Jesse's gift, which foreclosed all liability. The trial court granted Respondents' motion and dismissed the entire case. Adams appealed to the Court of Appeals. The commissioner transferred the case to this court. *See* RAP 4.4.

Analysis

I.

This court reviews an order granting summary judgment de novo. *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 348, 96 P.3d 979 (2004). Under CR 56(c), a court may grant summary judgment if the record presents no genuine issue of material fact and the law entitles the moving party to judgment. *Id.* "In conducting this inquiry, this court must view all facts and reasonable inferences in the light most favorable to the nonmoving party." *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d

[2] Matthew Adams agreed to dismissal of all of his claims against Respondents. The parties also agreed to dismiss all claims against Dr. Torrey.

853, 860, 93 P.3d 108 (2004). Such facts must move beyond mere speculative and argumentative assertions. *Retired Pub. Employees Council of Wash. v. Charles*, 148 Wn.2d 602, 612-13, 62 P.3d 470 (2003). The court should grant summary judgment "only if reasonable persons could reach but one conclusion." *Id.* at 613.

II.

The issue for review requires us to determine the scope of Jesse's anatomical gift. The parties agree that if the WAGA effectively authorized SMRI to accept Jesse's gift, then Adams has no cause of action against Respondents. Br. of Appellant at 28. Alternatively, if Respondents violated the WAGA, then we must consider Adams's theories of liability.[3]

A.

The WAGA authorizes a qualifying donee to accept an anatomical gift for certain purposes. The donor can make such a gift simply by signing an organ donor card attached to a driver's license form. Former RCW 68.50.540(3) (2003). A gift becomes irrevocable upon the death of the donor. Former RCW 68.50.540(8).

The WAGA limits the donees who may accept an anatomical gift and limits the purpose for which a gift may be made:

[3] The trial court did not provide reasons for its order of summary judgment, and the hearing on the motion for summary judgment apparently was not transcribed. *See* Resp'ts' Answering Br. at 11. Therefore, we assume that the court granted summary judgment both on grounds that Respondents complied with the WAGA and that Adams's claims for relief were legally deficient under CR 56(c).

> (1) The following persons may become donees of anatomical gifts for the purposes stated:
>
> (a) A hospital, physician, surgeon, or procurement organization for transplantation, therapy, medical or dental education, research, or advancement of medical or dental science;
>
> (b) An accredited medical or dental school, college, or university for education, research, or advancement of medical or dental science; or
>
> (c) A designated individual for transplantation or therapy needed by that individual.
>
> (2) An anatomical gift may be made to a designated donee or without designating a donee. *If a donee is not designated or if the donee is not available or rejects the anatomical gift, the anatomical gift may be accepted by any hospital.*

Former RCW 68.50.570 (1993) (emphasis added). While subsection (1) lists all qualifying donees who may accept a gift, subsection (2) expressly authorizes only hospitals to accept such an undesignated anatomical gift.

In this case, Jesse indicated his intent to make an anatomical gift of any organ but did not designate a donee for such a gift. The donor card signed by Jesse simply provided: "I herby make an anatomical gift to take effect upon my death. I give:

[x] Any organ [ ] Specifically_____."[4] CP at 269. Jesse checked the "[a]ny organ" box and did not write in any specific body part that he intended to donate. As Jesse did not designate a donee, his anatomical gift is governed by former RCW 68.50.570(2), which authorizes only a hospital to accept such a gift. SMRI is not a hospital as defined under the WAGA. Former RCW 68.50.530(6) (2003). Therefore, the WAGA did not authorize SMRI to accept Jesse's undesignated anatomical gift.

Respondents do not claim that SMRI is a hospital. Instead, they claim that Jesse's undesignated gift permitted any qualifying donee, including SMRI, to receive

[4] Adams contends that Jesse's donor card indicated the donation of only his organs and therefore did not authorize Respondents to take any blood and cerebral fluid samples. The WAGA defines an "[a]natomical gift" as "a donation of all or part of a human body." Former RCW 68.50.530(1) (2003). A "'[p]art'" is defined as "an organ, tissue, eye, bone, artery, blood, fluid, or other portion of a human body." Former RCW 68.50.530(7). As "organ" is listed separately from "blood" and "fluid," Jesse's gift of any organ technically did not include blood or fluid samples. However, the facts are undisputed that the blood and fluid samples were taken as part of SMRI's research on the brain. CP at 224-25. If Jesse made a valid gift of his organs to SMRI for the purpose of medical research, then such a gift would reasonably include the incidental extraction of blood and fluid samples.

his gift.[5] Respondents point out that under former RCW 68.50.570(2) a gift "*may* be accepted by any hospital," which they contend permits hospitals to accept donations but does not prohibit any other qualifying donee from accepting the gift. (Emphasis added.)

The canons of statutory construction do not permit such an interpretation. This court recognizes that "[o]missions are deemed to be exclusions." *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002) ("Under expressio unius est exclusio alterius, . . . to express one thing in a statute implies the exclusion of the other."); *State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792 (2003). Hospitals are one of several qualifying donees under subsection (1), but hospitals are the only donee listed in subsection (2) as authorized to accept an undesignated gift. If the legislature did not intend to limit undesignated gifts to hospitals, then we assume that subsection (2) would have stated that any qualifying donee could accept such gifts.[6]

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[5] Adams argues that Respondents should be estopped from asserting that Jesse's anatomical gift authorized them to remove his brain because they did not know Jesse had made the gift at the time they removed his brain. Adams claims that Respondents relied on only her consent as authority for the gift at the time they removed the brain. However, an anatomical gift made by the donor is irrevocable upon the death of the donor and does not require the consent of any other person. Former RCW 68.50.540(8). If Jesse's gift authorized SMRI to take the brain, then Adams had no right to revoke that gift. Therefore, Respondents cannot be estopped from asserting that Jesse made a valid gift to SMRI. Furthermore, Respondents are not liable to Adams for failing to obtain documentation of Jesse's gift before performing the autopsy. While the WAGA requires the medical examiner to look for a document of gift by the decedent upon assuming jurisdiction over the body, former RCW 68.50.560(3)(a) (1993), it provides immunity for anyone who fails to perform such a duty, former RCW 68.50.560(6).

Respondents further claim that subsection (2) applies only when a person dies in a hospital and it does not limit the ability of other donees to accept gifts procured outside of a hospital. While subsections (1) and (2) do not mention anything about the place of death as determining the scope of the gift, Respondents look to the history of the Uniform Anatomical Gift Act (UAGA), 8A U.L.A.[7] to support its interpretation. The original version of the UAGA authorized the "attending physician" to accept a donor's undesignated gift. UAGA §4(c), 8A U.L.A. 130 (1968). Respondents propose that a situation in which the attending physician would accept a gift logically could arise only in a hospital. The 1987 revision of the UAGA, adopted in Washington, changed "attending physician" to "any hospital." UAGA §6(b), 8A U.L.A. 54 (1987); *see* former RCW 68.50.570(2). Respondents contend that this change was made merely to encourage donation sharing among hospitals whenever a donor dies in a hospital. However, the revised language drops any reference to the

[6] For example, New Mexico's and Arizona's codification of their anatomical gift acts identify procurement organizations as appropriate donees for organs. N.M. Stat. Ann. § 24-6B-11(G)(3) (Supp. 2008) ("if the part is an organ, the gift passes to the appropriate organ procurement organization as custodian of the organ."); Ariz. Rev. Stat. Ann. § 36-850(G)(3) (Supp. 2007) (same).

[7] The UAGA originally was created in 1968. UAGA, 8A U.L.A. 69 (1968). It was revised in 1987 and 2006. UAGA, 8A U.L.A. 3 (1987); 8A U.L.A. 27 (2006) (Supp. 2008). Washington adopted the 1987 revision of the UAGA. *See* former RCW 69.50.520 (1993).

attending physician and therefore provides no grounds to infer that undesignated gifts are limited to hospitals only when a patient dies in a hospital under the care of a physician. By its very terms, the 1987 version indicates that any hospital may accept an undesignated gift without any regard of whether the donor died under the care of a physician. Nothing in this revised version suggests that the designation applies only when the donor dies in a hospital.

Our interpretation that undesignated anatomical gifts are limited to hospitals is consistent with the primary purpose of the WAGA to increase the number of anatomical gifts for donation. Former RCW 68.50.520 (1993). In enacting the WAGA, the legislature specifically declared that the demand for organs and body parts exceeded the supply for transplant. Former RCW 68.50.520(1). Although the WAGA goes on to permit donors to make an anatomical gift for purposes of research and medical education, the legislature did not acknowledge these purposes in its findings. Therefore, it makes sense that the legislature would direct undesignated gifts to a hospital, which could determine if there was a need for such an organ or body part for transplantation. If undesignated gifts were not directed to hospitals, then any donee could accept such a gift for any authorized purpose, without first determining if the organ could be used for transplantation.

Consistent with the legislative findings, we assume that one who makes an

anatomical gift contemplates that the gift could be used to satisfy the demand for transplants. On the other hand, it would be a stretch to assume that the legislature contemplated that undesignated gifts could be used for medical research or educational purposes even where a need for transplant exists. If SMRI or any other nonhospital wishes to increase donations, then they must obtain a specific designation from the donor or the family of the deceased or a donation from a hospital. Former RCW 68.50.540, .550 (2007).

B.

Apart from their reliance on Jesse's own anatomical gift, Respondents argue that they obtained Adams's consent to remove the brain. The WAGA instructs that an anatomical gift made by the donor does not limit the ability of an authorized person to make a further gift after the donor's death. Former RCW 68.50.540(10). Specifically, the WAGA authorizes a parent to make an anatomical gift of a child's body if the child has not expressly refused to make such a gift and has died without a spouse or issue. Former RCW 68.50.550(1)(e).

Respondents attempted to secure Adams's consent as Jesse's next of kin. Under former RCW 68.50.550(1)(e), Adams could have made a valid anatomical gift to SMRI at that time. Of course, Adams alleges that she did not donate Jesse's entire brain or other organs to SMRI, which presents the critical question of fact in this case

to be determined at trial. *See Sattler v. Nw. Tissue Ctr.*, 110 Wn. App. 689, 701, 42 P.3d 440 (2002) (reversing summary judgment because scope of consent to remove organ presented a question of material fact).

III.

Having determined that Jesse's undesignated gift did not authorize SMRI to remove his brain, we must address Adams's theories of liability for the alleged unauthorized removal.[8] Adams seeks both statutory and common law remedies, which we discuss in turn.

A.

Adams claims that the WAGA provides a cause of action for violation of its terms. While the WAGA does not expressly create a civil remedy, Adams argues that it implies a remedy from the various provisions protecting the choice of the decedent and family members to make an anatomical gift. Respondents counter that implying a cause of action does not serve the purpose of the WAGA because it was not created to benefit family members of decedents.

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[8] The WAGA also provides immunity for a "hospital, physician, surgeon, coroner, medical examiner, . . . or other person" who "*attempts*" to act in accordance with the WAGA in good faith. Former RCW 68.50.620(3) (1993) (emphasis added). Respondents may have a valid defense that they attempted to comply with the WAGA. While Respondents did raise the good faith immunity defense in their amended answer, they do not directly argue on appeal that they made a good faith attempt to comply with the WAGA. Such an issue presents a question of fact beyond the scope of our review. *See Sattler*, 110 Wn. App. at 701.

> This court will imply a statutory cause of action under a three-prong test:
>
> [F]irst, whether the plaintiff is within the class for whose "especial" benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.

Bennett v. Hardy, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990). In *Bennett*, this court recognized that the implied cause of action is premised on the assumption that the legislature would not specifically grant rights to a class of persons "without enabling members of that class to enforce those rights." *Id.* at 921. Therefore, we must determine whether the WAGA specifically granted a right for family members to authorize the donation of a body part or organ of the deceased that would require us to imply a remedy protecting such a right.

The question of whether the WAGA provides an independent cause of action was recently considered in *Amaker v. King County*, 479 F. Supp. 2d 1162, 1163 (W.D. Wash. 2007), *aff'd*, 2008 WL 4104234 (9th Cir.) (unpublished). In that case, the federal district court applied the *Bennett* test and rejected any implied cause of action under the WAGA. The court determined that the legislature enacted the WAGA to increase the number of organ donations for transplantation, not to protect family members of an organ donor. *Id.* The court further held that the WAGA did not grant rights to any identifiable class of persons. *Id.* at 1163-64. Finally, the court held that

an implied cause of action would not serve the purpose of the WAGA to encourage organ donations. *Id.* at 1164. We look to the reasoning in *Amaker* as persuasive authority.

As to the first *Bennett* prong, this court "look[s] to the language of the statute to ascertain whether the plaintiff is a member of the protected class." *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 475, 951 P.2d 749 (1998). The WAGA does not specifically benefit family members of organ donors. The legislature enacted the WAGA in order "to provide a program that will increase the number of anatomical gifts available for donation." Former RCW 68.50.520. Consistent with this purpose, the WAGA established procedures to facilitate the procurement of anatomical gifts. These procedures require potential donees to obtain the family's consent where the deceased had not made a gift before death. Former RCW 68.50.550. However, the WAGA does not create the family members' right to authorize a gift. Family members have the right to control the disposal of the body of a deceased relative where the deceased has not made prearrangements for disposal. RCW 68.50.160(3). Furthermore, family members derive an interest in the proper treatment of the body of a deceased relative under the common law, which as discussed below provides its own remedies to protect such a recognized interest. Therefore, the WAGA's procedures required to obtain consent do not grant rights to family members that require special

protection because absent the WAGA, potential donees presumably would still have to seek the consent of the donor or family of the deceased before procuring an organ or body part.

Adams claims that the legislature intended to protect the interests of all who are involved in the donation process. She relies on *Tyner v. Department of Social & Health Services*, 141 Wn.2d 68, 79, 1 P.3d 1148 (2000), in which this court recognized that the State's duty to investigate child abuse under RCW 26.44.050 created an implied cause of action for parents under investigation. In that case, the parties agreed that the statute specifically benefited child victims of abuse. *Id.* at 77. The issue was whether that benefit extended to the entire family unit in order to meet the *Bennett* analysis. Under the statute at issue, the legislature recognized the "'paramount importance'" of the parent child relationship "'and any intervention into the life of a child is also an intervention into the life of the parent.'" *Id.* at 78 (quoting RCW 26.44.010). This legislative finding led the court to conclude that the benefit extended to protect the interests of parents from unwarranted separation from their children.

Unlike the statute at issue in *Tyner*, the WAGA creates procedures for the procurement of organs, not for the protection of persons who donate organs. While the legislative purpose of the WAGA declares that "[d]iscretion and sensitivity must

be used in discussion and requests for anatomical gifts," former RCW 68.50.520(4), such language does not create a specific right or benefit like the kind in *Tyner*.

The second and third *Bennett* prongs also fail. As noted above, the legislature created the WAGA to increase the procurement of anatomical gifts. The legislature even provided immunity for anyone who complies with the WAGA or attempts to comply in good faith. Former RCW 68.50.620(3) (1993). Establishing good faith immunity serves the legislative purpose by encouraging potential donees to seek anatomical gifts without increasing the risk of liability. Implying a cause of action would be inconsistent with the effort to encourage the increased procurement of anatomical gifts. *See Amaker*, 479 F. Supp. 2d at 1164.

Adams argues that the good faith immunity actually indicates that the legislature implicitly recognized liability for all bad faith violations of the WAGA. However, if the legislature had intended to provide a remedy under the WAGA, it would have expressly created the liability to which the immunity corresponds. Furthermore, as Respondents point out, the comment to the revised UAGA of 2006 recognizes that "if a person acts in subjective 'bad faith,' the common law provides remedies." UAGA §18 cmt., 8A U.L.A. 70 (2006) (Supp. 2008). In this case, Adams has raised several common law claims against Respondents for the failure to obtain her consent. These claims are based on her asserted interest in Jesse's body, not on the

WAGA.

B.

Adams's complaint raised a cause of action titled "Tortious Interference with a Dead Body Restatement (Second) of Torts § 868 [1979]." CP at 193-94. This court has never adopted that section of the *Restatement*. However, this court has recognized a common law action for tortious interference with a dead body. *See Wright v. Beardsley*, 46 Wash. 16, 20, 89 P. 172 (1907); *Gadbury v. Bleitz*, 133 Wash. 134, 136, 233 P. 299 (1925). We recently affirmed the viability of the tort in *Reid v. Pierce County*, 136 Wn.2d 195, 207, 961 P.2d 333 (1998) (citing *Wright* and *Gadbury*). Respondents argue that Adams did not plead a common law claim and therefore this action should be dismissed. *See Amaker*, 479 F. Supp. 2d at 1163-64. Adams claims that the cause of action includes both the *Restatement* and the common law claims.

The complaint properly raised a claim under the common law action for tortious interference with a dead body. Our state rules of civil procedure merely require that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief." CR 8(a). The complaint simply must give sufficient notice to the defendant of the nature of the claim being brought. *Lightner v. Balow*, 59 Wn.2d 856, 858, 370 P.2d 982 (1962) ("[P]leadings are primarily intended to give notice to the court and the opponent of the general nature of the claim asserted."). We liberally construe pleading requirements in order "to facilitate proper decision on the merits,

not to erect formal and burdensome impediments to the litigation process." *State v. Adams*, 107 Wn.2d 611, 620, 732 P.2d 149 (1987).

The complaint in this case gave sufficient notice to Respondents of the nature of the claim brought against them. The only difference pointed out by Respondents between the common law action and the *Restatement* is that the *Restatement* permits liability for negligence, whereas the common law requires willful conduct.[9] Such a distinction does not warrant the dismissal of the entire cause of action for improper pleading. *Id.* ("If a complaint states facts entitling the plaintiff to some relief, it is immaterial by what name the action is called."). The complaint alleged that Respondents "intentionally, recklessly, and/or negligently" removed Jesse's organs without permission. CP at 193. Therefore, the complaint sufficiently apprised Respondents that they would have to defend against a claim of intentional misuse of Jesse's body. Furthermore, Adams correctly cited the common law tort in her response to summary judgment. CP at 329-31; *Adams*, 107 Wn.2d at 620 ("[I]nitial

[9] Adams also argues that this court should adopt the *Restatement*, presumably to include claims of negligence. However, this court has rejected a claim of negligent misuse because recovery is premised on mental suffering. *Gadbury*, 133 Wash. at 136 ("[I]f [mental] suffering is the direct result of a wilful wrong as distinguished from one that is merely negligent, then there may be a recovery."). Adams has not demonstrated why the facts of this case warrant extension of the tort to cover negligent conduct. Furthermore, negligence claims likely would be covered under the WAGA's immunity provision for attempting to comply with the WAGA in good faith. *See Ramirez v. Health Partners of S. Ariz.*, 193 Ariz. 325, 333, 972 P.2d 658 (App. 1998) (refusing to recognize negligence liability for violation of UAGA in light of good faith immunity).

pleadings which may be unclear may be clarified during the course of summary judgment proceedings.").

The tort of interference with a dead body allows recovery for mental suffering derived from the willful misuse of a body. *Gadbury*, 133 Wash. at 136 ("[I]f [mental] suffering is the direct result of a wilful wrong as distinguished from one that is merely negligent, then there may be a recovery."). The action is not based on a property interest in the body itself, but rather an interest in the proper treatment of the body. *See Herzl Congregation v. Robinson*, 142 Wash. 469, 471, 253 P. 654 (1927) (recognizing generally that "there is a right of custody over, and interest in, a dead body, and the disposal of the body"); *Wright*, 46 Wash. at 19 ("the action is for a wrong against the feelings of the plaintiffs inflicted by a wrongful and improper burial of their dead"). The interest extends to relatives of the deceased and those who control the right to dispose of the body. *See Gadbury*, 133 Wash. at 139 ("those persons who by relationship have a peculiar interest in seeing that the last sad rites are properly given the deceased may maintain the action"); RCW 68.50.160(3).

While the parameters of the misuse that gives rise to a cause of action for tortious interference might be difficult to grasp firmly,[10] this court may have best described it as misuse "in such a manner as to cause the relatives or persons charged

[10] Indeed, one court in expounding upon the basis for this tort proposed that "[a] corpse in some respects is the strangest thing on earth. *Louisville & Nashville R.R. v. Wilson*, 123 Ga. 62, 63, 51 S.E. 24 (1905).

with its decent sepulture to naturally suffer mental anguish." *Wright*, 46 Wash. at 20. Furthermore, we need not attempt to define more precisely the nature of such misuse as the extent or nature of the interference alleged generally does not bar recovery. *See Gadbury*, 133 Wash. at 137-38 ("[T]he extent or degree of the misuse ought not to prevent recovery.").

This court first recognized an actionable claim of the tort for an improper burial in *Wright*, where an undertaker had buried the corpse of a child in the same grave as another body and only six inches from the surface. 46 Wash. at 17. The court denied liability under a breach of contract theory for failing to bury the child according to agreement because the plaintiffs' based their claim for damages on mental suffering. Nevertheless, the court went on to conclude that "it would shock the sensibilities to hold that there was no remedy for such a wrong." *Id.* at 20. The court noted that the tort of wrongful interference traditionally related to the mutilation of a corpse, but concluded that an improper burial equated to a mutilation for purposes of raising an actionable claim. *Id.* (recognizing that a cause of action for wrongful mutilation "applies as well to a case such as the one at bar where the wrong consists of the manner of burial").

Later, in *Gadbury*, this court upheld a claim where an undertaker withheld a body from the mother of the deceased as collateral for payment of funeral expenses.

133 Wash. 134. While the court noted that a party cannot recover for mental suffering based solely on a claim of negligence, it held that intentionally withholding the proper burial of a body constituted a willful misuse of the body. *Id.* at 137. The court determined that willful delay in providing a burial was equivalent to the improper burial at issue in *Wright* for purposes of the tort. *Id.* Like *Wright*, the court focused on the emotional effect of the treatment of the corpse rather than the extent of misuse. *Id.* at 137-38 ("The misuse in one case may be greater in degree, but nevertheless it is a misuse."); *see Wright*, 46 Wash. at 20.

We believe that the unauthorized removal of a brain for use in scientific research involves the same kind of interference that causes mental suffering as would an improper burial or use of a body as collateral for payment of a debt. The permanent removal of the entire brain certainly can be considered a mutilation of the body. Furthermore, as mother of the deceased, Adams falls within the recognized category of plaintiff who can maintain a claim for mental suffering from such misuse. *See Wright*, 46 Wash. at 20 ("'That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated is too plain to admit of argument.'" (quoting *Larson v. Chase*, 47 Minn. 307, 312, 50 N. W. 238 (1891))).

Respondents argue that the interference with Jesse's body was proper because

the medical examiner has authority to remove organs while conducting an autopsy. RCW 68.50.106. However, such authority does not imply that the medical examiner has authority to retain the brain and merely return a veritable shell of the skull to the family for burial, absent some compelling reason for further examination. Here, the medical examiner found no abnormality in the brain and gave it to SMRI for its own private research. These facts clearly support an action for mental suffering based on the alleged misuse of a body.

We hold that Adams has raised an actionable claim for tortious interference with a dead body. Of course, Adams still must prove the elements of this tort at trial and our opinion does not determine the satisfaction of any of such elements as a matter of law. Furthermore, the extent of injury presents a question of fact outside the scope of our review on summary judgment. *See Gadbury*, 133 Wash. at 138.

C.

Adams claims that Respondents conspired to procure Jesse's body tissue without Jesse's or Adams's consent. "A conspiracy is a combination of two or more persons who contrive to commit a criminal or unlawful act, or to commit a lawful act for criminal or unlawful purposes." *John Davis & Co. v. Cedar Glen # Four, Inc.*, 75 Wn.2d 214, 223, 450 P.2d 166 (1969).

In this case, Respondents agreed to procure organs and body parts to be used

for medical research. CP at 252-57. While such an underlying agreement was not itself illegal, Adams alleges that Respondents agreed to procure Jesse's brain without Adams's consent. The procurement of an organ without the consent of the deceased or an authorized family member would violate the WAGA and therefore constitute an unlawful act. We hold that this allegation raises a question of fact sufficient to overcome summary judgment.

D.

Adams claims that Respondents invaded her privacy interests by turning over Jesse's body tissue and confidential records to SMRI. This court has adopted the *Restatement (Second) of Torts* § 652D (1977), recognizing a cause of action for invasion of privacy. *Reid*, 136 Wn.2d at 212-13. The tort premises liability on the publication of a private matter that would be highly offensive to a reasonable person and is not a legitimate concern to the public. *Id.* at 210.

In *Reid*, this court held that relatives of a deceased person have a privacy interest in the autopsy photos of the deceased. *Id.* at 212. The court reasoned that the autopsy photos were part of the intimate details of the relatives' lives in maintaining the dignity of the deceased. *Id.* at 210, 212. The court found support for this protection in the public policy expressed by the legislature to require that autopsy reports remain confidential. *Id.* at 210-11; RCW 68.50.105.

Adams's claim fails to allege any publication of private matters. While *Reid* supports Adams's claim that she has a privacy interest in Jesse's autopsy records, she does not allege that such records were published. Respondents entered into an agreement to share autopsy records, in which SMRI agreed to abide by all state privacy and confidentiality laws applicable to the medical examiner. CP at 256. Adams does not assert that SMRI breached such confidentiality. While a research facility may eventually have assimilated its research of Jesse's brain into data as part of a scientific publication, such filtered information likely would no longer contain any recognizable private matters connected to Jesse. Such dissemination does not rise to a highly offensive level like the publication of autopsy records to friends at a social gathering. *See Fisher v. Dep't of Health*, 125 Wn. App. 869, 880, 106 P.3d 836 (2005). Therefore, we hold that the trial court properly dismissed Adams's privacy claim.

E.

Adams claims that Respondents fraudulently obtained her consent to remove Jesse's organs. Fraud must be pleaded with particularity. CR 9(b). Particularity requires that the pleading apprise the defendant of the facts that give rise to the allegation of fraud. *See Pedersen v. Bibioff*, 64 Wn. App. 710, 721, 828 P.2d 1113 (1992); *Harstad v. Frol*, 41 Wn. App. 294, 301-02, 704 P.2d 638 (1985). Respondents

do not argue that Adams's claim of fraud is lacking particularity, but instead argue that any alleged misstatements made to Adams were irrelevant because Jesse gave an unrestricted gift. While we reject such a defense, we hold that Adams has failed to make a facial claim of fraud.

The elements of the fraud include:

> (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff.

Stiley v. Block, 130 Wn.2d 486, 505, 925 P.2d 194 (1996). Adams does not allege the misrepresentation of an existing fact. Instead, she claims that Respondents fraudulently represented their intent to take a sample of Jesse's brain tissue in attempting to obtain her consent. However, a false promise does not constitute the representation of an existing fact. *Id.* at 505-06 (holding that "a promise of future performance [is] not a representation of *existing* fact").

According to Adams, Respondents asked for her consent to take a sample of Jesse's brain tissue. Adams alleges that she gave such limited consent. Consistent with her given consent, the form completed by Dr. Haikal asserted that Adams agreed to donate Jesse's "brain tissue," not his entire brain. CP at 234. Therefore, Respondents did not obtain Adams's consent by fraud or fraudulently misrepresent the

scope of her consent. Essentially, Adams claims that Respondents broke their agreement to take a tissue sample rather than the entire brain. A broken promise does not support an action for fraud.

The real issue in this case is the scope of Adams's consent, not the fraudulent inducement to obtain her consent. Regardless of whether Respondents actually intended to take a sample or the entire brain, Adams consented to donate a sample of Jesse's brain tissue. While these facts support an action under other theories of recovery, Respondents did not commit fraud if they exceeded the scope of her consent.

Conclusion

We hold that the WAGA did not authorize SMRI to accept Jesse's undesignated anatomical gift. However, we affirm the order for summary judgment on Adams's claims for violation of the WAGA, fraud, and invasion of privacy. We reverse and remand on the remaining claims of tortious interference with a dead body and conspiracy.

AUTHOR:
Justice Susan Owens

WE CONCUR:
Chief Justice Gerry L. Alexander

Justice Charles W. Johnson	Justice Mary E. Fairhurst
Justice Barbara A. Madsen	Justice James M. Johnson
Justice Richard B. Sanders	Justice Debra L. Stephens
Justice Tom Chambers	